But even apart from the rules of pleading it is difficult to conceive that this counterclaim could possess any validity. It presupposes that the Custodian is automatically liable, in respect of the legal obligations of enemies whose assets he has taken control of, to creditors of such enemies, at least to the amount covered by the assets, a notion which seems alien to the whole practice and objects of the Custodian Law. It implies that the Custodian is accountable to such creditors, which also seems a somewhat novel idea. Finally it involves the assumption that the Custodian may be liable to provide redress for acts of these enemies committed outside his jurisdiction, also a somewhat unfamiliar idea.

Finally on the point of limitation which is pleaded in respect of the counterclaim, I would say that it is in fact academic, but that, if it is material, I have considered and agree with the views on the matter expressed by the learned trial Judge.

To conclude — the validity of the claim is not seriously questioned, and set-off and counterclaim cannot, in my opinion, for the reasons I have stated, succeed. I would, accordingly, dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Rodyk & Davidson; Donaldson & Burkinshaw.*

MAHERBAN v. PERALI SHAH

[A. C. J. (Thomson J.) September 13, 1955]

[Ipoh — Civil Appeal No. 10 of 1955]

Bills of Sale — Sale of plank and attap house — Property in apparent possession of seller — Unregistered bill of sale — Whether void as against judgment creditor — Whether plank and attap house is "personal chattel" — Attachment.

In this case the appellant had obtained judgment against one Hag Naiz and in pursuance of that judgment execution was issued on March 14, 1955 against the movable property of Hag Naiz and accordingly on the same date the bailiff attached a plank and attap house standing on a piece of land occupied by Hag Naiz on a Temporary Occupation Licence. On March 17, 1955 the respondent gave notice of objection to the attachment on the ground that he was the owner of the house and on March 29, 1955 the learned President allowed the objection with costs.

The material facts were that originally the house was the property of the judgment debtor. On December 5, 1954, some 15 days before service on him of the summons in the original proceedings, he sold the house to the objector. That transaction was embodied in a document which was executed at Alor Star. It was common ground that this document was at no time registered as a bill of sale and on the face of it was not attested by an advocate or a Magistrate in accordance with section 9 of the Bills of Sale Enactment (Cap. 57). The judgment debtor remained in occupation of the house. On these facts the learned President held that the transaction of December 5, 1954 was a genuine one and not fraudulent, that on that date ownership and possession of the house passed to the objector and that the document which was then executed was not a bill of sale.

On appeal it was contended that the transaction of December 5, 1954 was a nullity because in truth and in fact it amounted to a purported assignment of rights under a Temporary Occupation Licence in contravention of rule 41 of the Land Rules; it was also contended that the document executed on that date was a bill of sale, and it having not been registered and the grantor having remained in apparent possession, accordingly by reason of section 4(i)(b) of the Bills of Sale Enactment it was to be deemed fraudulent and void as against the judgment creditor.

Held: (1) on the face of it the document of December 5, 1954 only purported to transfer the house which was a movable property and the Court saw no reason to go behind the face of that document;

(2) in the circumstances of the case the document in question was a bill of sale within the meaning of the Bills of Sale Enactment;

(3) since the house remained in the apparent possession of the judgment debtor as against the judgment creditor the Bill of Sale was void.

Observations on questions relating to Bills of Sale.

Cases referred to:—

(1) *Charlesworth v. Mills* (1892) A.C. 231.

(2) *Ramsay v. Margrett* (1894) 2 Q.B. 18.

(3) *Youngs v. Youngs* (1940) 1 All E.R. 394, 352.

(4) *Haydon v. Brown* (1888) 59 L.T. 810.

(5) *Chua Sai Ngoh v. Beh Ai Meng* (1955) M.L.J. 167.

(6) *Ex parte Jay, In re Blenkhorn* (1873-4) 9 Ch. App. 697, 704.

CIVIL APPEAL.

P. P. Dharmananda for the appellant.

Respondent's case rested on Deed of Sale dated 5.12.54. He said he had bought the house but did not apply for transfer of Temporary Occupation Licence till March, 1955. The intention was to buy the house as it stood on the land. He could not buy the house as a house without having the rights conferred by the T.O.L. So purported Deed of Sale contravenes Rule 41 of the Land Code Rules and Section 24 of Contract Enactment. **Hee Cheng v. Krishnan** (1955) M.L.J. 103.

Document is a Bill of Sale within the meaning of Section 2 of Cap. 57. One of the rooms is occupied by the judgment debtor and so comes within apparent possession of judgment debtor as defined by Section 4(ii). On this I refer to **Ex parte Jay**(6) and **Seal v. Claridge** 7 Q.B.D. 516.

Bill in this case was void by reason of section 4(i)(b). It was not registered.

Ramsay v. Margrett(2) has little to do with this case because the fact was different. And see **Youngs v. Youngs**(3).

Jag-Jit Singh for the respondent.

There was no purported sale of the Temporary Occupation Licence rights. There was evidence that objector collected rent. Submit the document is not a Bill of Sale. It was a document of convenience. There is a finding of fact that possessions passed at the time of sale. (Document stamped $12 — 1% on alleged consideration). There was much more than formal possession. Onus of proof was not on objector but on the creditor Section 110. **Ramsay v. Margrett**(2) does apply.

What was bought was the house.

Dharmananda in reply.

There is no evidence that rent was paid to the objector.

Cur. Adv. Vult.

Thomson J. : — This is an appeal from the Sessions Court at Taiping.

On 4th February, 1955, one Maherban, who is the appellant in the present appeal, obtained judgment against one Hag Naiz for $1,600 and $154 costs.

In pursuance of that judgment execution was issued on 14th March, 1955, against the movable property of Hag Naiz and in pursuance of that execution on the same day the bailiff attached a plank and attap house standing on a piece of land occupied by Hag Naiz on a Temporary Occupation Licence. The learned President has held as a matter of fact that this house was movable property. This finding of fact has not been complained of and for the purposes of the present appeal it must be accepted.

On 17th March, 1955, one Perali Shah gave notice of objection to the attachment of the house in question on the ground that he was the owner of it and on 29th March, 1955, the learned President allowed the objection with costs. Against that decision the judgmen creditor has now appealed.

The facts of the case, so far as they are material, are not in dispute.

Originally the house was the property of the judgment debtor. He lived in it himself and two or three other people including one Mohamed Yacob also lived in it, apparently as his tenants. On 5th December, 1954, some 15 days before service on him of the summons in the original proceedings he sold or purported to sell the house to the objector for a sum of $1,200. That transaction was embodied in a document which was executed at Alor Star on the same day by himself and the objector. That document is headed "Deed of Sale" and is stamped to the value of $12, that is to say, as for "Conveyance, Assignment, Transfer or Absolute Bill of Sale" (See the Stamp Ordinance, First Schedule, Item 32). It recites that the judgment debtor has sold the house to the objector for $1,200 and proceeds as follows :—

"The said amount have received in full settlement from the said Perali Shah and I have given the possession of the same house. From the date hereof I have given the full rights of the said house and I have no claim towards the same house and free from all encumbrances."

It is common ground that this document was at no time registered as a Bill of Sale and it is clear on the face of it that it is not attested by an advocate or a Magistrate in accordance with section 9 of the Bills of Sale Enactment.

At the time the document was executed the judgment debtor handed to the objector his Temporary Occupation Licence and, on 9th March, 1955, the judgment debtor made an oral application to the Collector of Land Revenue for this licence to be transferred to the objector. Down to the date of trial nothing had been done about that application.

Some time after the execution of the document at Alor Star, apparently in February, 1955, the objector came to Taiping and in his presence the judgment debtor told Yacob, one of the tenants of the house, that the objector had bought it and that the rent should be paid to him and on this or some other occasion the objector collected $30 rent, it is not clear from whom. The judgment debtor remained in occupation of the portion of the house previously occupied by him, although he said he was paying rent for it to the objector, and at the time of the attachment he was still in occupation of it.

The learned President in a very clear judgment held in effect that the transaction of 5th December, 1954, was a genuine one and not fraudulent, that on that date ownership and possession of the house passed to the objector and that the document which was then executed was not a Bill of Sale.

The first ground of appeal is that the transaction of 5th December, 1954, was a nullity because in truth and in fact it amounted to a purported assignment of rights under a Temporary Occupation Licence in contravention of Rule 41 of the Land Rules. The second ground of appeal is that the document executed on that date was a Bill of Sale, that it had not been registered, that the grantor had remained in apparent possession of the goods comprised in it and that accordingly by reason of Section 4(i) (b) of the Bills of Sale Enactment it was to be deemed fraudulent and void as against the bailiff and as against the judgment creditor on whose behalf he was acting.

With regard to the first of these grounds of appeal, in my opinion this is without substance. On the face of it the document of 5th December, 1954, only purported to transfer the house which has been held to be movable property and I see no reason to go behind the face of that document.

The second ground of appeal, however, calls for more careful consideration.

The relevant portions of section 4(i) of the Bills of Sale Enactment which are the same as those of section 8 of the Bills of Sale Act, 1878, read as follows :—

"4. (i) Every bill of sale shall be attested and registered as provided in this Enactment and shall truly set forth the consideration for which it was given, otherwise the following consequences shall ensue —

(a) .....

(b) in the case of any other bill of sale* it shall ..... as against all bailiffs ..... seizing any chattels comprised in such bill of sale in the execution of any process of any Court .... also as against every person on whose behalf such process shall have been issued be deemed fraudulent and void so far as regards the property in ..... any chattels comprised in such bill of sale which at or after the time .... of executing such process, ... and after the expiration of seven days after the execution of such bill of sale are in the possession or apparent possession of the person making such bill of sale ....".

It follows, therefore, that in order to determine whether the transaction in the present case comes within that section, it is necessary to consider three questions :—

(a) was the document executed at Alor Star on 5th December, 1954, a Bill of Sale within the meaning of the Enactment?

(b) was the house with which that document dealt a personal chattel within the meaning of the Enactment? and

(c) at the time of the attempted execution on 14th March, 1955, was the house in the apparent possession of the judgment debtor?

The first of these questions was considered by the learned President and he came to the conclusion that the document was not a Bill of Sale. If he were right on that point, the other two questions did not arise and, having answered the question in the sense in which he did answer it, he quite properly refrained from answering them.

Before proceeding further, it will be desirable for the benefit of Magistrates who frequently have to decide difficult questions relating to Bills of Sale to make a few observations on the subject of a general nature.

A Bill of Sale is defined with great particularity in section 3 of the Enactment. Briefly, it embraces two classes of documents. One class includes absolute assurances (that is to say, conveyances) of movable property. The second class includes assurances of movable property by way of security for a debt. By reason of section 6 it is necessary that instruments of the second class but not instruments of the first class should be in the form prescribed by the Enactment. In England, documents of the first of these classes are dealt with by the Bills of Sale Act, 1878, and documents of the second class are dealt with by the Bills of Sale Act, 1882. In this country, the provisions of both these Acts have been included in a single Enactment, the Bills of Sale Enactment (Cap. 57), which will be repealed by the Bills of Sale Ordinance (No. 30 of 1950) when the latter is brought into operation. This local statutory arrangement may well lead to confusion unless care is taken to observe the distinction between the two classes of Bill of Sale particularly in the light of the objects of the legislature in subjecting them to control. These objects were dealt with by Lord Halsbury L.C. in the case of *Charlesworth v. Mills*[1]. The object of the 1878 Act, that is the Act relating to absolute assurances of movable property, was to prevent false credit being given to people who had been allowed to remain in possession of goods which apparently were theirs but with the ownership of which they had parted. The object of the 1882 Act, which dealt with Bills of Sale by way of security, was to protect impecunious debtors against the danger of signing documents the legal effect of which they did not understand. It was for this reason that a particular form of Bill of Sale was prescribed in such cases the use of which was in effect rendered obligatory.

In the present case there is no question of security and if the document is a Bill of Sale at all it is an absolute Bill of Sale and therefore to be dealt with in accordance with those portions of the local Enactment (so far as they are material they have already been quoted) which correspond to the English Act of 1878.

The definition of a Bill of Sale contained in section 3 of our Enactment is the same as that contained in section 4 of the 1878 Act and includes "assurances of personal chattels." The question of when such an assurance amounts to a Bill of Sale within the meaning of section 4 of the 1878 Act was considered by the Court of Appeal in the case of *Ramsay v. Margrett*[2] and the gist of that decision was thus stated by MacKinnon L.J. in the case of *Youngs v. Youngs*[3] :—

> "If a document is intended by the parties to it to be a part of the bargain to pass the property in the goods, then, whatever the form of the document may be, even if it be only a simple receipt for the purchase money, it is, by Section 4, to be deemed to be a bill of sale, though it is not so in fact. However, if the document is not intended to be part of the bargain to pass the property in the goods — if the bargain is complete without it, so that the property passes independently of it — then it is not to be deemed to be that which it is not in fact — a bill of sale."

In the case of *Haydon v. Brown*[4] it had been held by Lord Esher, M.R., who later delivered the leading judgment in *Ramsay v. Margrett, supra* that the test in each case was whether the document must be used in evidence to prove the title to any goods under it.

Considering the document in the present case in the light of these cases I am compelled to the conclusion that the learned President was wrong in holding that it was not a Bill of Sale. On the face of it, it was clearly intended to convey the property in the house to Perali Shah. Moreover, at the time, on rather immediately after the time, it was executed Perali Shah could not have asserted any rights to the house either against the judgment debtor or against anybody else without making use of the document in evidence. The document was executed at Alor Star, the house was at Taiping. There was no attempt at delivery or

* i.e. a Bill of Sale given otherwise than by way of security.

giving possession until some weeks later. It may be as a matter of law that there was some sort of constructive possession raised in Perali Shah but if so it was only raised by virtue of the document. In these circumstances I have no hesitation whatsoever in saying that the document was a Bill of Sale within the meaning of the Enactment.

Having come to that conclusion I have to consider the second question which has been postulated which is whether the house dealt with in the document was a personal chattel within the meaning of the Enactment. That question, to my mind, is concluded by the finding of the learned President that it is movable property. Personal chattels are defined in section 3 of the Enactment and the definition includes "goods, furniture, and other articles capable of complete transfer by delivery." In this country, the question of whether a house is or is not movable property is by no means free from difficulty (see *Chua Sai Ngoh (f) v. Beh Ai Meng*[5]), but once it is decided that it is movable property it very clearly falls within the expression "goods capable of complete transfer by delivery." Indeed, once it is established that it is movable I find it impossible to draw any distinction in kind, though of course there is a difference in degree, between such a house and for example a portable dog kennel or a bird cage. Each of them is capable not merely of notional delivery but of actual physical delivery and asportation.

Finally there is the question of whether on 14th March, 1955, the house was in the apparent possession of the judgment debtor. This question falls to be decided in accordance with section 4(ii) of the Enactment which corresponds to a portion of section 4 of the English Act of 1878 which in effect re-enacted the provisions of section 7 of the repealed English Act of 1855 and which reads as follows:—

> "Personal chattels shall be deemed to be in the 'apparent possession' of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person."

In the present case it seems to me on the evidence, in which there is no controversy, that the house clearly falls within both branches of that provision. It remained upon the land occupied by the judgment debtor and it was used and enjoyed by him.

The distinction between apparent and formal possession for the purpose of the English Act of 1855 was thus described by Sir G. Mellish L.J., in the case of *Ex parte Jay, In re Blenkhorn*[6]:—

> "The distinction is, that if a broker is simply put in and remains in possession, so as to prevent the removal of the furniture, but allowing everything to go on just as it did before, permitting everything to be used by the debtor and his family, then the goods still remain in the apparent possession of the debtor. There must be something done which takes them plainly out of the apparent possession of the debtor in the eyes of everybody who sees them."

In the present case there was nothing done which took the house plainly out of the apparent possession of the judgment debtor in the eyes of everybody who saw it. It is true that the tenant Yacob is said to have been told to pay his rent in future to the objector and it is true that the judgment debtor himself says he proceeded to pay rent to the objector. But in the eyes of other people and, in particular, in the eyes of other persons familiar with the neighbourhood, the position remained after the execution of the Bill of Sale exactly as it was before it. The judgment debtor went on occupying the house, the other tenant went on occupying the house. There was nothing to shew, for example, to the postman, to the scavenger or to any of the persons in white clothes carrying an account book wrapped up in a towel who had occasion to go about their business in the neighbourhood that there had been any change in possession. In the circumstances, the conclusion is irresistible that the house remained in the apparent possession of the judgment debtor.

I am thus compelled to say that as against the judgment creditor the Bill of Sale was void. There is, of course, no question of the judgment creditor or anybody else having in fact been deceived but actual deception of any person is not necessary to produce the consequences laid down by the Enactment. What the Enactment does is to penalise unregistered Bills of Sale in the public interest. The penalty is avoidance and in the present case I see no reason why the objector should not pay it.

The appeal is allowed with costs here and in the Sessions Court. The judgment of the Sessions Court will be set aside and in place of it an Order will be made dismissing the objection. The deposit paid by the appellant will be paid out to him.

Appeal allowed.

Solicitors: *Chabra & Dharmananda; Jag-Jit Singh.*